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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(1)(c) OF THE *WORKERS COMPENSATION ACT 1987*.

SUMMARY:

a. The application is dismissed.

Introduction and background

1. The applicant suffered a physical injury in the course of his employment on 18 July 2005. The insurer accepted liability and made weekly payments for all relevant periods. In 2015 the insurer made a work capacity decision, which they overturned following internal review. Weekly payments continued.
2. The insurer contacted the applicant by telephone on 2 November 2017 to advise that, due to the operation of section 39(1) of the 1987 Act, his weekly payments would cease after the effluxion of 260 weeks, with the effective date being in March 2018.
3. Written confirmation of this notice was sent to the applicant on 9 November 2017. That letter specified that medical evidence showed a 6% Whole Person Impairment (WPI), despite the insurer having previously accepted and paid a claim for 10% WPI for the same injury. The applicant was advised that since there was no evidence of WPI of greater than 20%, the March 2018 deadline would remain in force.
4. On 19 December 2017, the insurer sent a further reminder of the impending cessation of payments, this time specifying that the last day for receipt of payments would be on 14 March 2018, in an amount calculated to cover the period from 22 March 2018 to 9 April 2018. The last date of entitlement was therefore 9 April 2018. The insurer gave the applicant helpful information about how to seek community support or to contact Centrelink and gave direct contact details of his case manager in the event that he required further assistance.



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5. At no time between 2 November 2017 and 19 December 2017 did the Insurer make or purport to make a “work capacity decision.” Despite this, the applicant applied for “internal review” on or about 23 February 2018. The insurer did not conduct an internal review, there being no “decision” to review.
6. The applicant sought Merit Review from the Authority by application received on 17 April 2018. The Authority purported to make the following “finding” dated 18 May 2018:
 - Section 39 of the 1987 Act applies to the applicant and he has no entitlement to weekly payments of compensation.
7. The merit reviewer made no consequential recommendation.
8. An application to this office for procedural review was received on 05 June 2018. I am satisfied that the application has been made within time and in the proper form.
9. For reasons which will appear below, I am not satisfied that this office has jurisdiction to conduct a procedural review of what is effectively no more than a reminder letter sent to a worker in order to assist him to prepare for a transition from compensation to welfare payments.

Submissions by the applicant

10. Section 44BB(1)(c) of the 1987 Act states that this review is “*only of the insurer’s procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer.*” The applicant has provided the following submissions:
 - He has not been able to work for many years because he really can’t do it;
 - The insurer stopped his weekly payments because “the doctors believe [he] doesn’t have 21% disability”;
 - He has had to withdraw superannuation in order to survive; and
 - He has also had to have counselling and psychiatric consultations, these being “not the only problem.”



11. While it is true that no doctor has certified the applicant as having 21% or more WPI, the “reason” the insurer ceased payments was the preclusion in section 39(1) of the 1987 Act which does not allow payments to continue beyond 260 weeks unless a worker has greater than 20% WPI.

Submissions by the Insurer

12. The Insurer responded in the following terms:

- [The insurer] responds that this request is the result of the application of section 39 of the 1987 Act (weekly benefit cessation after 260 weeks of entitlement) which is a legislative disentitlement and not the result of a Work Capacity Decision.
- [The insurer] confirms that we have not completed a work capacity assessment/decision on [the applicant's] claim since July 2015. We note at that time [the applicant] submitted a request for internal review at which point [the insurer] overturned that work capacity decision and reinstated weekly payments to [the applicant].
- [The insurer] confirms that [the applicant] has continued to receive weekly benefits in accordance with Section 38(7) of the Workers Compensation Act and that he has received 260 weeks of weekly benefit entitlements up to and including 9 April 2018.
- Following an IME appointment with Dr J P on 4 October 2016 for Whole Person Impairment assessment, the subsequent report dated 6 October 2016 confirmed [the applicant] had been assessed as having a 6% Whole Person Impairment notwithstanding an earlier assessment and payment in 2008 in respect of 10% Whole Person Impairment.
- [The insurer] confirmed to [the applicant] by letter on 6 occasions that his weekly benefits would cease upon reaching 260 weeks of entitlement – 23/8/16, 3/11/16, 22/2/17, 9/11/17 and 19/12/17.
- [The insurer] also made at least 15 unsuccessful attempts to contact [the applicant] by phone to discuss cessation of weekly benefits between 4/10/17 and 15/2/18.
- [The insurer] is of the view that the requirements of section 39 have been met and the legislation applied correctly.

Decision



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13. I accept the submissions of the insurer in whole. The conduct of the insurer in this case has been exemplary, with great care being shown to explain precisely what effect the legislation will have on the applicant together with ongoing offers of assistance.

14. In the course of merit review the insurer made the same submissions, but were met with the following response:

“19.[...] I have considered the insurer’s submissions however I am not persuaded that the decision to cease [the applicant’s] weekly payments of compensation is not a work capacity decision under section 43 of the 1987 Act. I consider that is reviewable by the Authority in accordance with section 44BB(1)(b) of the 1987 Act.”

15. This is clearly an error by the merit reviewer. The only “decision” made by the insurer in this case was that the applicant’s WPI did not exceed 20%. Once that decision was reached, the operation of the statute itself barred the insurer from making any further payment beyond 260 weeks. More specifically, section 43(2)(b) is in the clearest of terms:

43(2) The following decisions are **not** work capacity decisions:

(b) a decision that can be the subject of a **medical dispute** under Part 7 of Chapter 7 of the 1998 Act.

16. Relevantly, section 319 of the 1998 Act appears in part 7 of Chapter 7 and says in part:

medical dispute means a **dispute** between a claimant and the person on whom a claim is made about any of the following matters **or a question about** any of the following matters in connection with a claim:

(c) the degree of permanent impairment of the worker as a result of an injury

17. It is unquestionably the case that the insurer has only made a decision about WPI and then informed the applicant of the consequences of that decision. By definition, it cannot be a “work capacity decision.” On that



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basis neither the merit review service of the Authority nor this office have jurisdiction to conduct a review.

Finding

18. I decline to conduct a procedural review.

RECOMMENDATION

19. The application is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal flourish extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
14 June 2018